

THIS OPINION WAS NOT WRITTEN FOR PUBLICATION

The opinion in support of the decision being entered today (1) was not written for publication in a law journal and (2) is not binding precedent of the Board.

Paper No. 26

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte JERRY KITTEN

Appeal No. 1996-0513
Application 08/149,766¹

HEARD: SEPTEMBER 16, 1999

Before METZ, JOHN D. SMITH and LIEBERMAN, ***Administrative Patent Judges***.

METZ, ***Administrative Patent Judge***.

DECISION ON APPEAL

This is an appeal under 35 U.S.C. § 134 from the

¹ Application for patent filed November 10, 1993. According to the official records of the Patent and Trademark Office (PTO), said application is a continuation-in-part of Serial Number 08/000,224, filed on January 4, 1993, and now abandoned.

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examiner's refusal to allow claims 1, 5, 6, 8 through 17, 19 and 20, the only claims remaining in this application.

THE INVENTION

The claimed invention is directed to a method for combating sugar-eating, slow-moving, soft-bodied insects which thrive on sugar-containing plant leaves. The method comprises spraying on leaves infested with said insects fertilizer composition comprising humic acid, nitrogen, phosphorus, calcium and boron. Appellant alleges to have discovered that the fertilizer, so-applied, significantly alters the sugar concentration in the plant leaves making the plant leaves undesirable to said insects.

Claims 1 and 13 are believed to be adequately representative of the appealed subject matter and are reproduced below for a more facile understanding of the claimed invention.

1. A method for combatting sugar-eating, slow-moving, soft-bodied insects which thrive on sugar-containing plant leaves, which comprises spraying on such leaves, infested with the insects, an effective

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amount of a fertilizer composition comprising a combination of humic acid with nitrogen, phosphorus, calcium and boron, each of which is present therein in an effective amount, and the humic acid is of a type which is suitable, in the presence of an effective amount of nitrogen, phosphorus, calcium and boron, to alter significantly the sugar concentration in the plant leaves on which said fertilizer composition is sprayed.

13. A method of claim 1 in which the composition comprises 2 parts by volume of each of **Foli-zyme™** and **Sett™** for each part by volume of **Charge™**.

The references of record which are being relied on by the examiner as evidence of obviousness are:

Nagasawa et al. (Nagasawa)	3,617,237	Nov. 2,
1971 ²		
Arnold	4,652,294	Mar. 24,
1987		

Bellanger, French Patent 75 19160, published January 14, 1977

Claims 1, 5, 6, 8 through 17, 19 and 20 stand rejected under 35 U.S.C. § 103 as being unpatentable from the disclosure in Arnold considered with Nagasawa and Bellanger.

² This U.S. patent is the equivalent of Belgian Patent 744,379.

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We reverse.

OPINION

The primary reference on which the examiner relies as evidence of obviousness is Arnold. Arnold is directed to a staged application of two foliar fertilizers at different stages of plant growth. We agree with appellant's argument that Arnold does not discuss anywhere in his disclosure sugar-eating, slow-moving, soft-bodied insects let alone combating such insects. We also agree with appellant that Arnold does not teach appellant's claimed fertilizer as useful in a method for combating insects in a single application on plants infested with sugar-eating, slow-moving, soft-bodied insects. While Arnold may be considered to disclose the individual ingredients used by appellant in the fertilizer composition of his method, those ingredients are described in Arnold for separate, sequential application to plants in different stages of growth (see Tables 1 and 2 of Arnold). Whether or not such separate, sequential application of the two, separate fertilizer compositions disclosed in Arnold would have been expected to combat sugar-eating, slow-moving, soft-bodied insects is entirely conjectural. This is especially true in

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light of the narrow construction appellant urges we give the appealed claims. Specifically, appellant urges that his claims are limited to particular insects, particular plants and particular times of application. Suffice it to say that, in order to establish *prima facie* obviousness in the first instance, the examiner must present evidence of obviousness, not conjecture.

We agree with the examiner's conclusion that Bellanger is merely cumulative to Arnold and, therefore, does not, either alone or in combination with Arnold, render the claims on appeal unpatentable. We also agree with the examiner that Nagasawa discloses that the particularly prepared humic acid required by claim 9 was well-known at the time appellant's invention was made. However, Nagasawa alone or in combination with Arnold and Bellanger does not render obvious, in the sense of 35 U.S.C.

§ 103, the subject matter here on appeal.

Accordingly, on this record, because the examiner has failed to establish that appellant's claimed method would have been obvious to a person of ordinary skill in the art, we need not address appellant's evidence of nonobviousness.

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In passing, we observe that claim 13 requires that the fertilizer used in the method of claim 1 is obtained by mixing in particular parts per volume 3 (three) proprietary products identified by only their trademarks. Nevertheless, appellant has filed in the record of this application product sheets for each of the aforementioned proprietary products which identifies their respective makeup and uses. Based on these product sheets and because claim 13 further limits the fertilizer used in claim 1 to a fertilizer prepared from these well-identified proprietary products, we do not find the use of the trademarks renders claim 13 unclear or confusing. Compare, Ex parte Simpson, 218 USPQ 1020-23 (Pat. & Tdmk. Off. Bd. App. 1982).

SUMMARY

The rejection of claims 1, 5, 6, 8 through 17, 19 and 20 under 35 U.S.C. § 103 is **reversed**.

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The decision of the examiner is reversed.

REVERSED

ANDREW H. METZ)	
Administrative Patent Judge)	
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JOHN D. SMITH)	BOARD OF PATENT
Administrative Patent Judge)	APPEALS AND
)	INTERFERENCES
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PAUL LIEBERMAN)	
Administrative Patent Judge)	

AHM/gjh

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